(a) a case of sufficient cogency can be made out; and
(b) the plaintiffs are informed of the application.

(See 22 *Atkin's Court Forms* (2nd Ed) (1986 re issue) at p 84.)

In *London City Agency* v *Lee*,[3] Meggary J held that the court has ample jurisdiction to make such an order in a proper case.

Based on Encik Balasundaram's submission and after reading the affidavit of the third defendant, I accept the defendant's reasons for filing the application ex parte and in my view a case of sufficient cogency was made out. However, from the facts, I am satisfied that the plaintiff was not informed of the application. In my view, this is fatal to the defendants' application. It will be noted in both cases of *Subramaniam*[1] and *Castle Fitness*[2] that the plaintiffs were aware of the application. In *Subramaniam*'s case,[1] counsel for the plaintiff was aware that the defendants' counsel were in the corridor of my court armed with an ex parte summons. Despite the absence of the plaintiff's counsel before me, I heard the application ex parte because it was an urgent matter. In *Castle Fitness*'s case,[2] it appears that the plaintiffs were not before the judge although their solicitors had advance knowledge of the ex parte application.

Therefore, in the circumstances of this application, I find that it is not proper for me to dissolve the ex parte injunction short of hearing the plaintiff or his solicitors. In my view, however compelling the reason was for the ex parte order to be dissolved immediately, the fact that the plaintiff or his solicitors were not informed of the application has persuaded me not to grant the order. In the result, I direct that this application be now heard inter partes and the necessary papers be served on the plaintiff or his solicitors. The registrar shall give a suitable date as soon as practicable.

Application dismissed.

Solicitors: *Ong & Manecksha; Balasundaram & Co.*

Reported by *Zarinah Marican*

Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v Bank Bumiputra Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S7-23-436-1988
LIM BENG CHOON J
23 MARCH 1990

Contract — Performance bank guarantee — Whether plaintiff required to prove contractor's default before bank's liability arises — Whether defendant bank is bound absolutely by the terms of the guarantee to pay the plaintiff on demand — Contracts Act 1950, s 81

This is an appeal by the defendant against the decision of the senior assistant registrar granting the plaintiff leave to enter final judgment of the sum of $179,384.58 together with interest and costs pursuant to O 14 of the Rules of the High Court 1980.

The cause of action of the plaintiff was grounded on the alleged breach of a bank guarantee whereby the defendant agreed to guarantee, in the sum of $179,384.58, the due performance of the contract ('the building contract') entered into between Sarikon Sdn Bhd ('Sarikon') and the plaintiff by which the contractor undertook to complete certain construction works for the sum of $3,587,691.65.

The plaintiff alleged, inter alia, that on 15 December 1987 the receivers and managers of Sarikon informed the plaintiff by telex of their intention to terminate all works under the building contract with effect from 18 December 1987 and Sarikon did on that date abandon the works on site. It was therefore asserted that by reason of the abandonment of works the plaintiff properly terminated the contract and called upon the defendants to honour the bank guarantee. The defendant, however, refused to honour the bank guarantee notwithstanding that the bank guarantee, according to the plaintiff, stood on the same footing as a letter of credit and the defendant, as a bank, was bound to honour the same upon its terms. The plaintiff therefore claimed that the defendants could not have any defence to their action and that the defendant was truly indebted to them for the sum stated in their statement of claim.

Held, dismissing the defendant's appeal:

(1) Section 81 of the Contracts Act 1950 reduces the efficacy of the provision that the liability of the surety is co-extensive with that of the principal debtor in cases where a surety has executed an agreement of guarantee or indemnity with the person indemnified indicating that the surety would pay subject only to the terms of the said agreement. In this respect, the English common law rule of disregarding whether the surety's obligation is absolute or conditional cannot apply.

(2) By the conditions of the guarantee, the defendant is bound to indemnify the plaintiff should Sarikon fail to execute the contract or commit any breach of their obligations thereunder unless relieved from the performance by any clause of the contract or by statute or by decision of a tribunal of competent jurisdiction. When Sarikon failed to execute the contract, that is, when they failed 'to complete and carry into effect' the works and they were not excused by any term in the contract or by the decision of a tribunal made before the demand for indemnity by the plaintiff to the defendant under the terms of the bank guarantee, then the defendant is bound to pay on demand.

[**Bahasa Malaysia summary**

Ini adalah satu rayuan oleh defendan terhadap keputusan penolong kanan pendaftar memberikan plaintiff kebenaran memasukkan penghakiman muktamad atas jumlah $179,384.58 bersama bunga dan kos, mengikut A 14 Kaedah-Kaedah Mahkamah Tinggi 1980.

Kausa tindakan plaintif berasaskan dakwaan kemungkiran satu jaminan bank di mana defendan bersetuju menjamin, atas jumlah $179,384.58, perlaksanaan kontrak ('kontrak pembinaan') di antara Sarikon Sdn Bhd ('Sarikon') dan plaintif. Mengikut kontrak itu, kontraktor bersetuju menghabiskan suatu kerja pembinaan bagi jumlah $3,587.691.65.

Plaintif mendakwa, antara lain, bahawa pada 15 Disember 1987 penerima dan pengurus Sarikon memberitahu plaintif melalui telex tentang tujuan mereka memberhentikan semua kerja di bawah kontrak pemebinaan bermula daripad 18 Disember 1987 dan Sarikon tidak memberhentikan kerja di tapak pembinaan pada tarikh itu. Jadi, oleh kerana pemberhentian kerja itu, adalah didakwa plaintif telah bertindak secara betul dalam menamatkan kontrak itu dan menuntut supaya defendan menghormati jaminan bank itu. Defendan, walau bagaimanapun, enggan menghormati jaminan bank itu tidak kira yang jaminan bank itu, mengikut plaintif, berdiri atas asas yang sama seperti surat kredit dan defendan sebagai bank wajib menghormatinya atas termanya. Dengan itu, plaintiff menuntut bahawa defendan tidak ada apa-apa pembelaan kepada tindakan mereka dan bahawa defendan benar-benar terhutang kepada mereka jumlah yang disebut di dalam pernyataan tuntutan.

Diputuskan, menolak rayuan defendan:

(1) Seksyen 81 Akta Kontrak 1950 mengurangkan kuasa peruntukan bahawa tanggungan seorang penjamin adalah bersesama (co-extensive) dengan tanggungan penghutang utama dalam kes-kes di mana seorang penjamin telah melaksanakan satu perjanjian jaminan atau tanggung rugi dengan orang yang ditanggung rugi (indemnified), menunjukkan yang penjamin itu akan membayar tertakluk hanya kepada syarat-syarat perjanjian itu. Berkenaan dengan ini, peraturan common law Inggeris tidak mengendahkan sama ada kewajipan penjamin adalah mutlak atau bersyarat tidak boleh dipakai.

(2) Menurut syarat-syarat jaminan itu, defendan wajib menanggung rugi plaintif sekiranya Sarikon gagal melaksanakan kontrak itu atau melakukan apa-apa keingkaran tentang kewajipannya di bawah kontrak itu, melainkan dilepaskan daripada perlaksanaannya oleh apa-apa fasal kontrak itu atau oleh statut atau oleh keputusan satu tribunal dengan bidang kuasa yang teratur. Apabila Sarikon gagal melaksanakan kontrak itu, iaitu apabila mereka gagal melengkapkan dan menjalankan kerja-kerja itu dan tidak dilepaskan oleh apa-apa terma kontrak itu atau keputusan satu tribunal yang dibuat sebelum tuntutan untuk tanggung rugi oleh plaintif kepada defendan di bawah terma jaminan bank itu, defendan wajib membayar apabila tuntutan dibuat.]

Cases referred to

1 *General Surety & Guarantee Co Ltd* v *Francis Parker* [1977] 6 BLR 17 (refd)
2 *Howe Richardson Scale Co Ltd* v *Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 (refd)
3 *Hamzeh Malas & Ors* v *British Imex Industries Ltd* [1958] 1 All ER 262 (refd)
4 *Discount Records Ltd* v *Barclays Bank Ltd* [1975] 1 All ER 1071 (refd)
5 *RD Harbottle (Mercantile) Ltd* v *National Westminster Bank* [1977] 2 All ER 862 (refd)
6 *Edward Owen Engineering Ltd* v *Barclays Bank* [1978] 1 QB 159 (refd)
7 *United Commercial Bank* v *Bank of India* AIR 1981 SC 1426 (folld)
8 *Damatar Paints (P) Ltd* v *Indian Oil Corp* AIR 1982 Delhi 57 (folld)
9 *Pesticides India* v *State Chemicals & Pharmaceuticals Corp of India* AIR 1982 Delhi 78 (folld)

Legislation referred to

Contracts Act 1950 s 81

Zainal Abidin bin Jamal for the plaintiff.
S Suhendran for the defendants.

Cur Adv Vult

Lim Beng Choon J: This is an appeal by the defendant against the decision of the senior assistant registrar ('SAR') given on 30 January 1989 granting the plaintiff leave to enter final judgment of the sum of $179,384.58 together with interest and costs pursuant to O 14 of the Rules of the High Court 1980 ('the RHC').

The cause of action of the plaintiff was grounded on the alleged breach of a bank guarantee dated 20 August 1986 ('the bank guarantee') whereby the defendant agreed to guarantee, in the sum of $179,384.58, the due performance of the contract dated 24 November 1986 ('the building contract') entered into between Sarikon Sdn Bhd ('Sarikon') and the plaintiff by which the contractor undertook to complete certain construction works for the sum of $3,587,691.62. The action of the plaintiff was instituted on 16 August 1988 by a writ endorsed with a statement of claim. The plaintiff obtained judgment in default of appearance. However the default judgment was later set aside on a ground which is not relevant to the matter which I have been asked to decide. On 23 November 1988, the plaintiff applied by way of summons-in-chambers for leave to enter final judgment pursuant to O 14 of the RHC (see encl 14). In support of the application, the plaintiff's deputy managing director affirmed an affidavit (encl 13) in which it was alleged, inter alia, that on 15 December 1987 the receivers and managers of Sarikon informed the plaintiff by telex of their intention to terminate all works under the building contract with effect from 18 December 1987 and Sarikon did on that date abandon the works on site. It was therefore asserted that by reason of the abandonment of works, the plaintiff properly terminated the contract and called upon the defendant to honour the bank guarantee which the plaintiff did by their letter of 22 December 1987. The defendant, however, refused to honour the bank guarantee notwithstanding that the bank guarantee, according to the plaintiff, stood on the same footing as a letter of credit and the defendant, as a bank, was bound to honour the same upon its terms. The plaintiff therefore claimed that the defendant could not have any defence to its

action and that the defendant was truly indebted to it for the sum stated in its statement of claim.

The defendant had, through its manager of the Credit Recovery Department, filed in three affidavits in which a number of allegations were made. However, at the hearing of the defendant's appeal against the SAR's decision, counsel for the defendant submitted that there was only one issue before this court, namely, that in view of the fact that Sarikon had alleged that the plaintiff had wrongly terminated the contract and a claim for damages had been conveyed to the plaintiff, could the plaintiff call upon the defendant to honour the bank guarantee? In support of his contention, counsel drew my attention to the following passage from the text book on *Modern Contract of Guarantee* by O'Donovan (1985 Ed) where the author said at p 605:

> Performance bonds are of two types. The first type is a conditional performance bond, whereby the guarantor only becomes liable upon proof of a breach of the terms of the principal contract by the builder, and the owner sustaining loss as a result of such breach. The guarantor's liability, therefore, will only arise in the usual way as a result of the principal's default. The second type of performance bond is an unconditional or 'on-demand' performance bond which is so drafted that the guarantor will become liable merely when demand is made upon him by the owner.

In referring to the bank guarantee in the present case counsel suggested that it came under the former class of performance bonds as stated in the aforesaid passage. Counsel also drew my attention to the case of *General Surety & Guarantee Co Ltd* v *Francis Parker*[1] where it was held that the plaintiffs were only liable to the employer to the extent that it could prove that the contractor had made default and that sums of money, damages, costs, charges and expenses had become due and payable by the contractor to the employer by reason or in consequence of that default.

Counsel for the plaintiff, on the other hand, submitted that it was not 'the duty' of the defendant bank to enquire whether there was a dispute between Sarikon and the plaintiff and he drew my attention to the case of *Howe Richardson Scale Co Ltd* v *Polimex-Cekop and National Westminster Bank Ltd*[2] where it has been held that the position of the bank which gave the guarantee is not identical with but very similar to the position of a bank which has opened a confirmed irrevocable letter of credit and that whether the obligation arises under a letter of credit or under a guarantee, the obligation is the same, namely, the said bank is bound to pay regardless of any dispute as to the sufficiency of performance between the indemnified and third party. It has also been suggested in that case that the court is not concerned whether the bank's obligation is absolute or not.

A review of the English case law seems to suggest that a performance guarantee, like an irrevocable or confirmed letter of credit, is a guarantee by the bank to a seller for payment of price. The bank is not concerned with the contract entered into by its customer and the third party or with any dispute between the buyer and the seller. The terms of the guarantee and the bank's obligation to pay are contained in the guarantee itself. There is a line of English authorities acknowledging this proposition — see for example *Hamzeh Malas & Ors* v *British Imex Industries Ltd*,[3] *Discount Records Ltd* v *Barclays Bank Ltd*[4] and *RD Harbottle (Mercantile) Ltd* v *National Westminster Bank*.[5] The principle laid down in these authorities has been considered by the English Court of Appeal in *Edward Owen Engineering Ltd* v *Barclays Bank*.[6] Thus Lord Denning said at p 171 of the reported case:

> All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

However that may be, the question to ask and to be answered is whether the English common law principle can apply to a performance guarantee given in our country in view of s 81 of our Contracts Act 1950. That section says:

> The liability of the surety is co-extensive with that of the principal debtor *unless it is otherwise provided by the contract.* (Emphasis is mine.)

To my mind, the words emphasized by me are of some significance. The said words reduce the efficacy of the provision that the liability of the surety is co-extensive with that of the principal debtor in cases where a surety has executed an agreement of guarantee or indemnity with the person indemnified indicating that the surety would pay subject only to the terms of the said agreement. In this respect therefore the English common law rule of disregarding whether the surety's obligation is absolute or conditional cannot apply. Since our contract statute is a replica of the Indian Contract Act 1872, it is useful to look into the Indian authorities in order to find out how the Indian courts deal with the issue. The answer to the issue can be found in *United Commercial Bank* v *Bank of India*[7] where it is stated at p 1438:

> A bank which gives a performance guarantee must honour that guarantee according to the terms. In *RD Harbottle (Mercantile) Ltd* v *National Westminster Bank* [1977] 3 WLR 752, Kerr J considered the position in principle. We would like to adopt a passage from his judgment at p 761: It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the lifeblood of international commerce.

> Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise trust in international commerce could be irreparably damaged.

Again it was held in *Damatar Paints (P) Ltd* v *Indian Oil Corp*[8] that an irrevocable performance bank guarantee is a distinct separate transaction. If disputes arise between the company on whose behalf the guarantee is given and a corporation in whose favour it is given and the disputes are referred to arbitration, the payment of the guarantee cannot be stayed pending the arbitration. This proposition is followed in *Pesticides India* v *State Chemicals & Pharmaceuticals Corp of India*.[9]

The next step I need to take is whether the defendant bank in the present case is bound absolutely by the terms of the bank guarantee to pay the plaintiff on demand. The facts that are not in dispute are that the contractor, Sarikon, had abandoned works on site and by reason of the abandonment of works the plaintiff had properly terminated the contract with Sarikon — see para 7 of the affidavit (encl 13) in support of the plaintiff's claim affirmed by its deputy managing director on 21 November 1988 and exhs 'TKE 2', 'TKE 3' and 'TKE 4' annexed to that affidavit. Furthermore the authorized representatives of Sarikon at the site meeting held on 12 November 1987 (see exh 'TKE-5' annexed to the affidavit in reply affirmed by the deputy manager of the plaintiff on 2 October 1988 — encl 10) agreed that if Sarikon had to abandon the works then the defendant could call in another contractor to do the works in which case the defendant would be entitled to forfeit 'the performance bond'. Although I accept that the remarks of the authorized representatives of Sarikon could not bind the plaintiff, nevertheless their remarks clearly showed that Sarikon had unilaterally terminated their contract to carry out the works. This is clearly in violation of their contract with the defendant annexed as exhibit 'TKE-3' in encl 10.

Adverting to the bank guarantee, its heading states 'Bank Guarantee *for the Performance Bond*' (emphasis is mine) and in recital (2) it is stated:

> The Guarantor has agreed to guarantee the due performance of the contract in the manner hereinafter appearing.

The crucial condition appears in para (1) of the said agreement which reads:

> (1) If the Contractor (unless relieved from the performance by any clause of the Contract or by statute or by decision of a tribunal of competent jurisdiction) shall in any respect fail to execute the Contract or commit any breach of his obligations thereunder then the Guarantor will indemnify and pay the principal the sum of Malaysian Ringgit: one hundred seventy nine thousand three hundred eighty four and sen fifty eight only (M$179,384.58) provided that the principal or his authorized representative has made a claim against the Guarantor not later than six (6) months after the expiry date of the Contract.

It can at once be noted that the defendant is bound to indemnify the plaintiff should Sarikon fail to execute the contract or commit any breach of their obligations thereunder unless relieved from the performance by any clause of the contract or by statute or by decision of a tribunal of competent jurisdiction. When Sarikon failed to execute the contract, that is, when they failed 'to complete and carry into effect' the works (see meaning of 'execute' as defined in *Jowitts Dictionary of English Law* (2nd Ed) Vol 1 p 741) and they were not excused by any term in the contract or by the decision of a tribunal made before the demand for indemnity by the plaintiff to the defendant under the terms of the bank guarantee, then the defendant is bound to pay on demand. Any arrangement between Sarikon and the plaintiff with or without consent of the defendant or any alteration in the obligations of Sarikon or forebearance on the part of the plaintiff is of no concern of the defendant (see condition 12 of the bank guarantee). In the circumstances and applying the legal principle enunciated in the aforementioned authorities, I have no hesitation in holding that the defendant is bound to pay the plaintiff once a demand has been made pursuant to the bank guarantee. To hold otherwise would reduce the efficacy of the bank guarantee and the trust in banks in international commerce would be irreparably damaged.

The appeal of the defendant against the decision of the SAR dated 30 January 1989 is therefore dismissed with costs.

Appeal dismissed.

Solicitors: *Zainal Abidin & Co; Saheran & Woon.*

Reported by *Kevin Mathews*